EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111943/2021

5 **Held in Glasgow on 20, 21, 22, 25, 26 & 27 April 2022**

Employment Judge: C McManus

Members: R McPherson

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Mrs K Beaton	**Claimant** **Represented by:** **Mr A Beaton - Husband**
B & Q Limited	**Respondent** **Represented by:-** **Mr S Hughes - Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The unanimous decision of the Tribunal is that:-

- The claimant's claim of (constructive) unfair dismissal is unsuccessful and is dismissed.
- The claimant's claim of disability discrimination under section 13 of the Equality Act 2010 is unsuccessful and is dismissed
- 25 The claimant's claim of disability discrimination under section 15 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim of discrimination under section 21 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim of harassment under section 26 of the Equality Act 2010 is unsuccessful and is dismissed.

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- The claimant's claim of victimisation under section 27 of the Equality Act 2010 is unsuccessful and is dismissed.

- The claimant's claim under section 13 of the Employment Rights Act 1996 in respect of unlawful deductions from wages is unsuccessful and is dismissed.

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REASONS

Background

1. The claims are in respect of unfair dismissal (constructive dismissal), disability discrimination and unlawful deductions from wages / non provision of pay slips. The circumstances relied upon are set out in a paper apart to the ET1 claim form. All claims were resisted, with grounds of resistance set out in a paper apart to the ET3 response form. Agenda forms were completed by both parties. A Preliminary Hearing ('PH') had taken place for the purpose of case management.

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2. It is the claimant's position that she has the protected characteristic of disability, in respect of her conditions of rheumatoid arthritis and psoriasis. In very general terms, the circumstances relied upon in these claims relate to the alleged treatment of the claimant by the respondent as a result of the restrictions in response to the COVID 19 pandemic. It is the claimant's position that she ought to have been treated by the respondent as Clinically Extremely Vulnerable ('CEV'). The respondent disputes that the claimant has the protected characteristic of disability and denies all of the claims.

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3. The claimant was represented by her husband, who had no prior experience in such representation. The respondent was expertly professionally represented by Mr Hughes. Steps were taken throughout the Hearing, in line with the overriding objective set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'), to seek to ensure that the parties were on an equal footing. Thanks were given by Mr Beaton for the steps taken. Thanks are given to Mr Hughes for his professional representation and the assistance given by him in his approach towards the claimant and to the Tribunal.

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4. All documents relied upon were included in the Bundle of Productions, which was presented numbered, ordered and paginated, with pages from 1 – 432. Documents in that Bundle are referred to in this Judgement by their page number (B1 – B432).

5 5. The morning of the first day of this Hearing was spent seeking clarification of the claimant's case and the statutory provisions relied upon. The claimant's representative had helpful prepared a document where he sought to set out what circumstances were relied upon in respect of each statutory provision against which a claim was made ('Schedule of Less Favourable Treatment' 10 (B396 – B430). Following that discussion, it was agreed to adjourn proceedings for the afternoon to give the claimant's representative time to consider the position and to prepare questions for the claimant and the respondent's witnesses. Parties were directed to have discussion on the List of Issues and on any matters which could be agreed.

15 6. Following these discussions and the adjournment, the claimant's position was clarified as follows:-

- In the claim of constructive Dismissal, the claimant relies upon there having been a breach of the implied term of trust and confidence. She relies on a series of events, as set out at B396 – B400, with the 'last 20 straw' being the decision issued following the grievance hearing. It is accepted that that decision was not appealed.

- Equality Act section 13 – the circumstances relied upon as being direct discrimination under section 13 of the Equality Act 2010 are set out at B402 – B411 and at B413 – 414.

25 • Equality Act section 15 – the circumstances relied upon as being discrimination arising from disability under section 15 of the Equality Act 2010 are set out at B412.

- Equality Act section 19 – no reliance is being placed on section 19 (indirect discrimination) and the claim under that section was withdrawn.

- Equality Act section 20/ 21 – the circumstances relied upon as being a failure to comply with the duty to make adjustments are set out at B415 – B416 and are in respect of the alleged failure to give the claimant a non-customer-facing role, which the claimant alleges would then have allowed her to return to work.

- Equality Act section 26 – the claimant relies on section 26(10(b)(ii) in respect of the incidents set out at B417 – 420, alleging conduct by the respondent's employees Paul Purdie, Paul Meechan and Sally McDaid.

- Equality Act section 27 – the circumstances relied upon are set out at B421 – B428. The claimant relies on section 27(2)(d).

7. During the course of the Hearing, the respondent conceded (i) that the claimant raising a grievance with the respondent was a protected act (ii) that the circumstances relied upon by the claimant in the claims under the Equality Act 2010 were a series of connected acts, and so no issue of time bar was being relied upon and (iii) although it was disputed that the claimant had the protected characteristic of disability, it was conceded that if it be determined by the Tribunal that the claimant does have that protected characteristic, then it would be conceded that the respondent would have known, or ought to have known of that by their receipt of the instructed occupational health report In October 2020 (B253 – 255).

Issues for Determination

8. The issues for determination by the Tribunal were identified by Mr Hughes and agreed by Mr Beaton as set out below. These were the issues considered by the Tribunal.

Constructive Unfair Dismissal

- Did the Respondent fundamentally breach the Claimant's contract of employment entitling the Claimant to resign?

- If so, did the Claimant resign in response to that fundamental breach?

Remedy for Unfair Dismissal

- What remedy, if any, is the Claimant entitled to?

Disability

- Is the Claimant disabled within the terms of section 6 of the Equality Act 2010?
- If the Claimant is disabled, from what date did the Respondent have or ought the Respondent to have had such knowledge?

Direct Disability Discrimination (s13 Equality Act 2010)

- Did the Respondent discriminate against the Claimant on the grounds of disability?

Discrimination Arising From Disability (s15 Equality Act 2010)

- Has the Respondent treated the Claimant unfavourably because of something arising in consequence of the protected characteristic of disability?

Failure to make reasonable adjustments (s20 Equality Act 2010)

- Was the Respondent under a duty to make reasonable adjustments in respect of the Claimant?
- Was the Claimant placed at a substantial disadvantage in comparison with people who are not disabled?
- Did the Respondent know or ought it reasonably have been expected to know that the Claimant was placed at a substantial disadvantage?
- What is the Claimant asserting would have been a reasonable adjustment for the Respondent to make?
- Would that proposed adjustment have been reasonable and would it have eliminated or reduced the substantial disadvantage?

Harassment (s26 Equality Act 2010)

- Did the Respondent engage in unwanted conduct?
- If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- Was it reasonable for the conduct to have such an effect on the Claimant?

Victimisation (s27 Equality Act 2010)

- Was the Claimant subject to detriment because of her protected act? If so, what was that detriment?

Unlawful deduction from wages (s13 Employment Rights Act 1996)

- Did the Respondent make deductions from the Claimant's wages between September 2020 and October 2021?
- If so, were such deductions required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract of employment or had the Claimant previously signified in writing her agreement or consent to the making of the deductions?

Compensation

Is the claimant entitled to any award in respect of any breach of the Equality Act 2010, and if so in what amount, having regard to:-

(a) any financial loss sustained as a direct consequence of any such unlawful treatment and

(b) any impact of any such unlawful treatment on the claimant

Proceedings

9. All evidence was heard on oath or affirmation. Following the claimant's evidence, evidence for the respondent's case was heard from Paul Purdie

(Trading Manager), Paul Meehan (Retired Unit Manager); Sally McDaid (Assistant Unit Manager) and Stephen Clancy (Unit Manager, who heard the claimant's Grievance).

Findings in Fact

10. This is not a narration of events but sets out the facts which are material to the issues for determination. The following material facts were uncontested, admitted or proven.

11. The respondent is the UK's largest home improvement and garden centre retailer. It has approx. 24,000 employees throughout the UK. The claimant worked as a Show Room Customer Advisor at the East Kilbride ('EK') store. Her duties included selling kitchens and bathrooms and assisting customers in their design of those. The claimant started working for the respondent on 8 October 2014. She resigned with immediate effect by letter dated 11 October 2021. The claimant was well regarded by the respondent during the time of her employment with them. She achieved an award as best salesperson in the region.

12. The claimant was diagnosed with arthritis in 2006 and with psoriasis in 2010. She is prescribed immunosuppressant medication. There was a period of time when, due to the medication's side effects, the claimant did not take any immunosuppressant mediation. In that period when she did not have that treatment, the effects of the claimant's arthritis worsened significantly. The claimant had significant joint stiffness, pain and fatigue. She was unable to bend to put on clothes or shoes. She required assistance dressing and undressing. She had difficulty with stairs. She was unable to enter or exit a walk in shower cabinet without assistance. She was unable to prepare meals. From January 2020 the claimant has been prescribed an alternative immunosuppressant medication, which she continues to take, with dose having been increased from 10mg to 20mg per day. The effects on her day to day activities of her condition of arthritis have improved as a result of taking that medication. The effects of that medication are that the claimant is more susceptible to infections circulating in the community. The claimant continues

to take painkillers as required. The claimant is under the continuing care of a Nurse Practitioner from the Rheumatology Department at Hairmyres Hospital (B86). She is under review and has regular blood test checks for blood count and liver function.

13. Around 23 March 2020, while she was at work, the claimant received a phone call from a Nurse from the Rheumatology Department at Hairmyres Hospital. That nurse told the claimant that because of the risks from the COVID 19 pandemic she shouldn't be at work and should be at home shielding. The nurse told the claimant that information for her employer was available on the NHS Lanarkshire website. The claimant told the then Unit Manager of the EK Store, Ruth Wiseman, about the phonecall. Ruth Wiseman did not ask for any further evidence from the claimant at that stage. She said that the claimant needed to leave the building and go home, which the claimant did. The respondent's stores were then closed in the first weeks of the lockdown starting in March 2020.

14. On 7 April 2020, the claimant received a phone call from a manager in the respondent's EK store. The claimant was told that she was being placed on furlough and paid in accordance with the Coronavirus Job Retention Scheme ('CJRS'). The claimant was told that while on furlough she should not work or access the respondent's systems. Around this time all of the respondent's employees were put on furlough, other than a skeleton staff. The claimant remained on furlough until end June 2020. In mid June 2020 the claimant's line manager, Paul Purdie (Trading Manager) telephoned her to discuss her return to work. The claimant said to Paul Purdie that she was on immunosuppressant medication. Paul Purdie asked the claimant if she had received a shielding letter. The claimant said that she had not. Paul Purdie suggested that the claimant speak to her GP. The claimant then spoke to her GP. The GP certified the claimant as unfit for work in the period from 2 July 2020 to 31 July 2020 (B219) because of '*H/O rheumatoid arthritis*". In the 'Comments' box, the GP wrote:-

"*since 2006. Psoriatic arthropathy 2010. High risk*

Drug monitoring, Under regular review

Rheumatology. Pt in high risk category under

Covid-19 circumstances."

15. The fit note form stated that the doctor would not need to assess fitness for work at the end of the period. The claimant's husband handed that fit note in to the EK store.

16. Those employees who had been shielding were due to return to work for the respondent at the end of July 2020. Around 8 July 2020, Paul Purdie again phoned the claimant. He said that the sick note ('fit note') was not the information which B & Q were looking for. He discussed the various changes which had been put in place at the EK store as a result of the Covid 19 pandemic, such as screens, one way systems, additional cleaning, etc. Paul Purdie understood that the claimant was uncomfortable about returning to work because of the risk of contracting COVID 19.

17. Around the time of that call, on 8 July 2020 Paul Purdie was sent risk assessment template RAS042 from the respondent's HR department. He printed this out and considered it with regard to the claimant's return to work. That printed version shows that it was the version last updated on 10 June 2020, by John Norfolk. John Norfolk has responsibility for risk assessments throughout the respondent's business. Paul Purdie wrote on the copy of RAS042 which he had printed out (B220 – B227). On the first page, he wrote the claimant's name (B220). Under the information heading '*Clinically Extremely Vulnerable'* he put an asterisk beside the words "*People on immunosuppressant therapies sufficient to significantly increase risk of infection'* (B221). In doing so, Paul Purdie did not complete a risk assessment for the claimant. Those handwritten notes were not intended to be sent to or seen by the claimant. That document (B220 – B227) was sent to the claimant in July 2021, as part of the response to the claimant's subject access request. That document (B220 – B227) was not intended to record a completed risk assessment. The risk assessment is completed after a discussion, with input from the employee to whom it relates. The nature and size of the respondent's

business is such that in relation to store assistants, risk assessments are normally carried out by way of a discussion between the employee and their line manager on the employee's return to work. At that stage, adjustments are usually able to be immediately put in place. The respondent knew that the claimant was taking immunosuppressant medication but did not know if the level taken was '*sufficient to significantly increase risk of infection',* so putting the claimant in their '*Clinically extremely vulnerable / Shielding' ('CEV')* category.

18. After her phone call with Paul Purdie around 8 July, the claimant again spoke to her GP. Her GP told her to ask her employer how they were bringing her back to work safely. The claimant phoned Paul Purdie on 30 July 2020 to discuss this. Paul Purdie said that he would send the claimant the risk assessment form. The template form was referred to as '*the risk assessment'.* The risk assessment template form is not normally sent to employees. The risk assessment template form is normally printed out by the line manager and used to assist discussions with the employees at their return to work meeting, particularly with a view to reasonable adjustments being put in place. Paul Purdie sent a risk assessment template form to the claimant on the basis that this would assist the return to work discussions. The emails dated 30 July 2020 (B230) are the emails Paul Purdie sent to the claimant after their phone call on 30 July. He intended to have further discussions with the claimant, on the basis of what was stated in the template risk assessment, to ensure that the claimant felt safe about returning to work. Paul Purdie intended to send the claimant risk assessment template form RAS0042, which is the version he had previously received from HR (B220 – 227). By mistake, Paul Purdie instead attached and sent to the claimant risk assessment template form RAS0043, which is relevant to the respondent's stores in the Republic of Ireland rather than in the UK. The risk assessment template form sent by Paul Purdie to the claimant on 30 July 2020 is at B231 – B237. Both versions of the risk assessment template have the same introductory paragraph. This reads:

"*This risk assessment has been written to assist managers assess the risks presented to vulnerable colleagues by Covid 19. In order to do this managers*

will need to assess the relative vulnerability of each vulnerable colleague and assess if sufficient additional controls and work adjustments can be practically made in order to control the risks presented to vulnerable individuals."

19. The claimant understood that Paul Purdie would call her on 31 July 2020 to discuss the risk assessment and her return to work. Paul Purdie did not phone the claimant on 31 July 2020. The claimant read the risk assessment template which had been sent to her by Paul Purdie on 30 July (RAS043 @ B231 – 237). That included in the section for 'Clinically Extremely Vulnerable' a statement that '*the risk presented to these individuals would be too high to consider that it would be safe for them to come to work."* On that basis, and because Paul Pardie had not phoned the claimant on 31 July 2020, the claimant presumed that it was unsafe for her to return to work. The claimant then spoke to her GP and was certified as unfit for work.

20. Employees who had been shielding were due to return to work for the respondent at the start of August 2020. The claimant did not return to work then. The claimant was certified as unfit to work for the period from 1 August 2020 until 31 August 2020. During that period of sickness absence, the claimant's income increased because she went from being on furlough and being paid 80% of her wages, to being on sick pay and being paid 100% for a period.

21. The 'Return to Work Interview Form' at B217 does not record details of a return to work meeting with the claimant. Sally McDaid (EK store Depute Unit Manager) used that form to record the reasons for the claimant's absences, stated as "*Furloughed with initial furlough and then uncomfortable to return – now sick note handed in so now absence from 2/7/20 as per GP sick note."*

22. On 30 September 2020, Paul Purdie phoned the claimant. He invited her to a meeting to discuss her long term absence. There was discussion about risk assessment. The claimant's position was that she was waiting to know how she was going to be brought back to work safely. The claimant sent an email to Paul Purdie after this call. (B243- B244). That email begins '*Thank you for your call today. It was good to hear a friendly voice from B & Q'*. The claimant

then set out her recollection of events and her position in respect of the reasons for her absence since March 2020. She requested an agenda or information on what would be discussed at the forthcoming meeting. Paul Purdie wrote to the claimant on 30 September (B245 – 246). That letter was in a standard
5 template format. It invited the claimant to a long term absence review meeting at the EK store on 6 October 2020. That letter also stated:-

"It would appear that it has been some time since we have had any form of direct contact with you. In line with our absence policy, you'll need to follow the Notification of Absence Procedures. You'll need to phone the absence line
10 *if you work in store or contact your line manager or other agreed contact if you work elsewhere.*"

23. From that time the claimant telephoned the EK store on a weekly basis and spoke to one of the managers. The claimant was not certified as unfit for work after 30 September 2020. Her absence continued. The claimant was not
15 managed under the respondent's absence management policy. The claimant was not managed under that policy because it was understood that the claimant was uncomfortable about returning to work in circumstances of the ongoing Covid 19 pandemic, the claimant was considered to be a valuable employee and it was not wished to put any pressure on the claimant to return
20 to work in the unusual circumstances of the Covid 19 pandemic. It was recognised by the respondent that individuals had responded in different ways to the pandemic and that some individual's mental health had been affected.

24. In reply to Paul Purdie's letter of 30 September, the claimant wrote to him on 3 October 2020 (B247). She stated that the proposed time and date was
25 unsuitable for her. She requested that because of '*rising infection rates'* the meeting take place over the phone rather than in store or in an alternative location. That request was agreed to. On 7 October 2020 Paul Purdie wrote to the claimant notifying her of the meeting taking place by phone on 9 October. That letter was delivered to the claimant by hand. Paul Purdie conducted the
30 long term absence incapacity review meeting with the claimant by phone on 9 October 2020. He used the guidance issued by the respondent for these meetings (B250). Notes were taken of the discussion at this meeting. The

notes at B251 – 252 are an accurate summary of what was discussed. These notes record the claimant being asked what her doctor's advice was and the claimant's answer being "*Doctor said – can you be brought back to work safely – risk assessment carried out but states immunosuppressant would stop me from working. Line provided."* The notes record Paul Purdie's response being "*The risk assessment shows how we would make the environment safe for you by providing appropriate PPE and sanitising."* The notes record that the claimant asked if she could work from home and was told that she could not because designs have to be carried out in the store. The notes record Paul Purdie saying "*We would like to support you in coming back to work. We would refer you to HML to get advice on how you can come back."* And the claimant's response being *"I'm happy with that."*

25. Following the respondent's referral of the claimant to their Occupational Health provider, Health Management ('HML'), the claimant spoke to an Occupational Health Advisor on the phone and an Occupational Health Report was produced (B253 – 255). Under the heading 'Relevant History / Current Situation), the report states:-

"As detailed in your referral.

Mrs Beaton has been shielding since March as she suffers with rheumatoid arthritis and psoriasis. Following the Occupational Health assessment, I can confirm that Mrs Beaton was clinically assessed as having a health condition that puts them in the Government, Public Health and NHS COVID 19 high risk, extremely vulnerable category."

26. Under the heading "*Advice on the Disability Provisions of Equality Act (2010)* in the report, the Occupational Health Nurse's position was that claimant's medical condition "*would appear to cause substantial impairment of day to day activities and is likely to persist beyond 12 months, which in my opinion is likely to mean that the provisions of the Act will apply. However, as you will appreciate, I cannot give any more definite view that that as ultimately this is a legal and not a medical decision."*

27. Under the heading '*Recommendations to Manager / HR'* was stated:-

"*Explain the COVID 19 safe working measures that are in place for this employee at work. Consider the recommendations within this report, to see if there are any other COVID 19 safe working measures that may be operationally feasible to consider for their role at work. I would advise that that management discuss the covid risk assessment before her return to work to ensure the workplace has measures to ensure that it is covid secure. I would recommend that management consider a non customer facing role if this is operationally feasible, if not then t would be advisable to ensure that face coverings are used where customer facing interaction is essential. I advise that if possible at work, use back to back or side to side working (rather than face to face working) wherever possible."*

28. The Occupational Health report also made recommendations in respect of hygiene considerations. It advised that the claimant remained vulnerable to flare ups of her conditions, the severity and frequency of which could not be predicted, and that the respondent should '*review her trigger points for workload and absence management purposes.'*

29. Paul Purdie discussed the recommendations with the claimant. It was discussed that no non-customer facing roles were available for the claimant. Paul Purdie explained to the claimant the various changes which had been put in place in the EK store to implement covid safe working measures. Paul Purdie offered the claimant a role working on the checkout tills. He explained that the claimant would have a Perspex screen behind and in front of her, separating her from the customers and other staff while sitting at the till. He discussed the use of hand sanitizer and face masks. He discussed that the only non-customer facing role at that time was an out of hours role. He offered that role to the claimant. Paul Purdie was unsure about the suitability of that role for the claimant. The role involved stacking shelves and tiding the store. Paul Purdie did not have authority to create a role for the claimant.

30. After that call, the claimant sent an email to Paul Purdie on 9 November 2020 (B270 – 271). It that email the claimant set out her understanding of the position. She queried the discussions about return to work, in the context of her understanding that according to the risk assessment it was not safe for her

to return to work. That email set out the areas of the Occupational Health report which the claimant considered to be contradictory, and why. In respect of adjustments, the email stated:-

"*My recollection of the conversation is that you initially said the Occupational Health advisor stated a non-customer facing roll should be adopted but if this was unavailable certain measures should be put in place such as back to back or side by side working and the use of screens.*

I am concerned this advice also appears contradictory. It appears to support a non-customer facing role then sets this aside. This also contradicts the B&Q risk assessment mentioned above. Following one of our prior conversations, I discussed options for returning work with B&Q with my GP. The GP's advice was that strict social distancing needed to be followed due to the increased risk of me catching the virus and my increased risk of serious side effects of the virus. Working closely beside a colleague and members of the public is not suitable due to the prevalence of asymptomatic spread and the prevalence of the virus (it is active in the community).

31. In her email of 9 November 2020 (B270 – 271) the claimant requested further information in respect of her (mis)understanding that she did not require to certify her absence (with sick lines). She asked for an explanation why pay slips had not been provided. Paul Purdie did not respond to that email in writing. He spoke to the claimant and believed that he had answered her queries in those phone calls. The claimant continued to phone the EK store on a weekly basis. On most weeks, the claimant spoke to Paul Purdie. Paul Purdie's position was that the claimant should come into the EK store to see the steps which had been taken to counter the risk of the spread of COVID 19 and discuss what other adjustments may be necessary for the claimant to return to work. The claimant's position was that the risks from the Covid 19 virus were such that it was it was not safe for her to come into the store. In these phone calls there was discussion on some options which the respondent considered could be put in place to allow the claimant to return to work. The options discussed at that time were:-

- A return to the claimant's previous role, but with extra social distancing in place
- A position on checkouts with additional screens, so that the claimant was effectively in a 'box', with additional cleaning being carried out after that space was used by another and it not being used by another during the claimant's shift.
- An out of hours position during a twilight shift, restocking shelves, without heavy lifting.

32. The phone calls became short, with the claimant just confirming that she was phoning in. On 9 December 2020 the claimant spoke to another manager, Stuart Watson, when she made the weekly call. She asked him for a grievance form. The claimant followed this up with an email to Paul Purdie on 9 December 2020 (B273) asking that the grievance form be sent to her electronically. Paul Purdie hand delivered the form to the claimant. He did not check that she had received the form or contact her to check whether she wanted to pursue raising a Grievance. On 17 December 2020 the claimant sent an email to Paul Purdie (B274). She confirmed that she had not received the grievance form. December 2020 was a busy time for the respondent. The government advice on the steps which should be taken to counter the risks from COVID 19 were changing. The respondent had a duty to follow the guidance to allow the stores to remain open. The claimant's absence was not a priority to be dealt with at that time. The respondent did not want to put pressure on the claimant to return to work because it was understood that some individuals had continuing heightened concern about the risks from Covid 19.

33. The claimant was concerned that she was not receiving pay slips. In October 2018 the respondent had notified its employees that they were moving to a paperless system and that payslips could be accessed digitally via an app, rather than being printed on paper. There was a two year notice period in respect of this change. The claimant opted to continue to receive paper pay slips. That option came to an end in October 2020. There was no

communication sent by the respondent to the claimant in October 2020 in respect of payslips from that time only being available via the app. From October 2018 the app became generally used by the respondent's employees to access pay slips and book holidays. The claimant was informed about the app but did not access this.

34. The payments the claimant received from the respondent from March 2020 fluctuated because the claimant was receiving her full pay, then she was furloughed and received 80% of her pay, then because she was certified by her GP as unfit for work, she received sickness pay from the respondent: initially at full pay and after eight weeks only SSP. Details of these payments were in the digital payslips available on the 'Sap Fiori' app. The claimant had had two years' notice of the change to that paperless system. The option to receive paper payslips expired in October 2020. The claimant was aware that from March 2020 her payments from the respondent continued as normal for a while, then increased and then decreased. She did not query the amounts of the payments she was receiving. Paul Purdie spoke to the claimant about her requests for paper pay slips. He explained to her that the business had moved to digital payslips on the app. Due to the claimant's insistence on receiving paper pay slips, Paul Purdie contacted HR. He was told that it would be difficult to provide paper pay slips and that the claimant should access pay slips vis the app. All of the respondent's employees have accessed pay information, including viewing monthly salary statements, and have requested holidays via the app since November 2020. After the claimant's resignation, she was sent paper copies of her pay slips from November 2020.

35. On 15 March 2021 Paul Purdie sent the claimant by email risk assessment template RAS043. RAS042 was the risk assessment template which was applicable to the EK store and which had been updated following government advice. RAS043 was again sent to the claimant in error. RAS043 was not updated in accordance with changing guidance from the Scottish Government. In mid May 2021 it was realised that the 'wrong' risk assessment template had been sent by Paul Purdie to the claimant. Sally McDaid then sent the claimant RAS042.

36. Paul Meehan was Unit Manager of the EK store at that time. He had experience as a Unit Manager, based in several stores over the years. He became involved because the claimant had instructed a solicitor in respect of the matter, and that solicitor had written to Paul Meehan on her behalf. Following receipt of that solicitor's letter, on 7 April 2021, Paul Meehan set out pertinent questions to the contact 'People Partner' from the respondent's Regional HR contact. (B280 – 281). He was referred to another section of HR. The letter from the solicitor had requested that future correspondence be with them. Paul Meehan replied to that letter stating that he wished to continue to work with the claimant to try to seek to get her back to work.

37. Paul Meehan spoke to the claimant by phone on 13 May 2021. He discussed that adjustments could be put in place for the claimant. He explained to her why she was being treated as absent. The handwritten notes in the Long-Term Absence Log are an accurate reflection of what was discussed. That note includes:-

"I discussed what do we need to do to keep her in our team. I said that everything would be on the table, including a change of dept., a change of hours."

And

"I explained that she had been classified as absent because she had not provide the NHS shielding documentation and that CEV colleagues had all returned to work twice after two periods of shielding'

38. Paul Meehan suggested that the claimant discuss with Sally McDaid (Depute Manager) options for working in other areas in the store. The claimant subsequently had telephone conversations with Sally McDaid. Various options were discussed to enable the claimant to return to work. They discussed what the claimant would be able to do and what would be done to try to protect her from the risk of Covid. They discussed the possibility of the claimant working at a till. Sally McDaid described to the claimant that arrangements could be put in place so that effectively the claimant would be working within a Perspex 'box', with a screen in front and behind her, with cleaning of the area before

and after her shift and with that area not being used by any other staff member while the claimant was on shift. There was discussion about the options of the claimant answering phones in the office. That was a role which the respondent was willing to create for the claimant. The work was being done by another employee as part of their duties. Sally McDaid also offered the claimant a role pricing, working hours when there were no customers in the store. Sally McDaid discovered that Paul Purdie had sent the claimant risk assessment template RAS043 rather than RAS0042. Sally McDaid sent the claimant template RAS0042, as then last updated on 4 November 2020 (B258 – 267). In that, under the heading 'Reasonable Adjustments' is a list of '*Examples of potential Temporary Reasonable adjustments/ non customer facing roles where 2m social distancing can be stringently maintained".* Not all of the examples in the list were offered to the claimant because not all were suitable taking into account the claimant's skills and experience and the required work. One of the options discussed with the claimant was her working '*back of house' ('*BOH')*,* in a non – customer facing role, answering phone calls. That was a role which the respondent was willing to create for the claimant to enable her to feel comfortable about returning to work with them.

39. The claimant discussed with her GP some of the options which had been proposed to allow her to return to work. The claimant understood that her GP was concerned about the asymptomatic spread and level of Covid virus in the community and the suitability of 'back to back' working. The claimant's GP advised her to speak to her employer about how she could return to work safely. Sally McDaid asked the claimant to come into the EK store to have that discussion on a practical basis. The claimant would not come into the store.

40. Sally McDaid arranged for a conference call to take place to enable discussion about risk assessments between herself, the claimant and John Norfolk. John Norfolk is the respondent's Risk Manager. He has responsibility for risk assessments throughout the whole of the respondent's stores. John Norfolk and his team had responsibility for creating and updating the risk assessments, including those relevant to the Covid 19 pandemic. In that call, John Norfolk

explained to the claimant the purpose of the risk assessment template forms. He admitted to the claimant that mistakes had been made by B & Q. RAS0043 had been sent to the claimant in mistake. It was discussed on the call that John Norfolk would carry out a risk assessment on the claimant, based on the latest updated version of RAS0042. Following that call, the claimant was sent the updated version of RAS0042.

41. Following the conference call on 25 July 2021 the claimant sent an email to Sally McDaid (B299) in the following terms:-

Thank you for attaching a copy of the most recent RAS042 risk assessment.

Yes, Thursday's conference call with yourself and John Norfolk was very helpful. John was very knowledgeable about the B&Q risk assessment and measures introduced to protect employees. Confirmation by John that RAS042 is the appropriate risk assessment for myself was also comforting. I am pleased to now be in possession of the correct risk assessment and most recent version reflecting current public health circumstances this is the first time since the pandemic started that this has been the case.

I believe we have discussed some of the options however further discussion is needed to confirm those suitable to my circumstances. John confirmed the direction given to me by my doctor, that working on tills is not suitable due to asymptomatic spread and prevalence of virus in circulation is correct. This appears to rule this option out. I don't recall us discussing the option BOH customer support – telephones, CRM, NPS monitoring, customer enquiries. This option coming to light after our last discussion when you emailed res 042 at the end of May. I would very much like to discuss this option further to find out what it entails on Wednesday.

Finally while I fully acknowledge the efforts of yourself and John on the conference call there remained several issues which have not been resolved.

My understanding of our dialogue is that a safe return to work is the ultimate goal. I do not feel safe returning to the East Kilbride store while Paul Purdie is still a manager there. I acknowledge the options available would place me in

another section of the store. unfortunately given the management structure at some point Paul Purdie would be the manager in overall control of the store, while yourself and Paul Meehan were on leave or other shifts. This would expose me to unacceptable health and safety risks.

5 *My concerns are not based on hearsay or supposition but in confirmed actions which have risked my health. Paul Purdie delayed giving me a risk assessment while discussing return to work, provided me with the wrong risk assessment twice, advised my doctor's advice of being high risk was 'not what we are looking for you, will be rota' ed in'. The doctor's advice appears to have been* 10 *subsequently lost and in providing the wrong risk assessment created a situation where I have been financially disadvantaged. A situation was created where I am following one risk assessment (RAS043) while the store management are following another (RAS042). I must confess concern also that internal management practises at the East Kilbride store have permitted Paul* 15 *Purdie's actions to go unchecked. Paul Meehan's' internal email of 26 April, advising no shielding letter, indicating I was not considered CEV appears to suggest no effort by management to verify information.*

Looking forward to our discussion on Wednesday and resolving other outstanding issues to deliver a safe return to work."

20 42. It was decided that Sally McDaid was the most appropriate person to carry out the risk assessment discussion with the claimant because of her knowledge of the EK store and the steps which could be taken in that store. Sally McDaid had carried out a number of individual risk assessments to enable employees who were categorised as CEV and / or employees who were over 70 years of 25 age to return to work in the store. When carrying out those risk assessments, the individual employees had had a discussion with Sally McDaid on their return to work, the risk assessment had been completed by her following the RAS0042 template and adjustments had been put in place on that day to enable the individual employee to start work. The adjustments put in place for 30 such employees included measures such as, at the employee's request, placing a seat near an open doorway, to increase air flow. The size and nature of the respondent's business is such that this type of adjustment can be put in

place immediately on the person's return to work. Adjustments were put in place which were tailored to the individual employee's needs and were in addition to the many steps put in place within the stores to reduce the risk of contraction of Covid 19, such as increased hygiene, one way systems, screens, etc. Sally McDaid intended to have that type of discussion with the claimant.

43. Sally McDaid spoke to the claimant on the phone on 28 July 2021. There was discussion about an alternative role being created for the claimant 'back of house'. Sally McDaid felt that there was a change in the claimant's tone in that phone call. The claimant was on speaker phone and her husband was prompting her. Following the call, Sally McDaid sent an email to the claimant (B304 – 305). That email is an accurate summary of what was discussed on the call. It states:-

"*Just to recap on today's conversation:*

- *We spoke about the call last week with John on the risk assessment and you are happy after he explained how this would be used and personalised for you to ensure you were comfortable with returning to work. You were also happy that John would look over the risk assessment once we completed it together and you were happy with it and would make suggestions if needed.*

- *We went over the BOH role that we could set up temporarily to support your return to work. This would be a role based in the warehouse admin office where there is very little footfall. The role would include telephony and dot.com paperwork and you were happy with this suggestion. We did discuss this is a temporary role and it would be reviewed during and after the pandemic.*

- *You had asked about holiday entitlement. I have taken some guidance on this, and if you wanted to take annual leave this would be possible. if you would like me to book holidays for you, send me the dates I will organise this for you.*

- *I did try to explain that your absence has been managed as per the absence policy however I am not sure we came to any agreement on this.*

- *We had explored the issue you have raised with Paul Purdie based in the East Kilbride store. As explained, there is no evidence of Paul Purdie putting anyone in store at risk with H&S during the pandemic. Paul would have no input into your risk assessment that would be in place for your safe return to work and also would not be permitted to make any changes to it.*

- *You had said you would not return to East Kilbride whilst Paul was still deployed in East Kilbride. I did offer the option if you wanted me to request to a transfer to another store however you did state that you were not interested in a transfer. if you do want to consider this then again, please let me know and I will escalate this to the appropriate personnel.*

- *You have stated that you no longer wish to communicate with us and that you would like for us to liaise with your legal advisor. I will pass this information on as requested.*

- *You have indicated that we have still not answered all of your questions. Again, I will pass this information on although when I explored the questions you did express you were unhappy about receiving the incorrect risk assessment on two occasions."*

44. The claimant submitted her completed grievance form on 23 August 2021 (B311 – 313). In the section of the grievance form asking for her desired outcome, the claimant sought a settlement payment rather than a return to work. The claimant stated in this section:-

"*I had desperately wanted to return to B&Q having had a number of good years with colleagues and customers. I enjoyed the sales environment and interaction with public. Unfortunately this experience has eroded all confidence in the East Kilbride store management. I do not feel safe returning to the store while my present line manager remains at the store. Subsequent correspondence has shown B&Q as an organisation unwilling to follow good*

governance and to step in to correct missteps by management. Misrepresentation of information is tolerated. Failure to follow practices is tolerated. Selective and inconsistent recording of information by store management is tolerated. My desired outcome is for a settlement to cover financial loss through loss of earnings and the stress I have endured trying to resolve matters informally."

45. Stephen Clancy (Unit Manager) was appointed to hear the grievance. The grievance hearing with the claimant took place by phone on 31 August 2021. The notes at B316 – 322 are an accurate reflection of what was discussed. The claimant confirmed that her grievance was related to the following:-

(1) Issuing of wrong risk assessment by Paul Purdie

(2) Failure of line manager to provide risk assessment or advise of risk assessment being updated

(3) Failure by B&Q East Kilbride store management to correctly interpret medical information.

(4) Failure of line manager and B&Q East Kilbride to explain contradiction in Occupational Health report.

(5) Miscommunication of medical circumstances by B&Q EK store manager to within organisation.

(6) Withholding of reasonable adjustment options by Paul Purdie.

(7) Incorrect absence logs.

(8) Discrimination through offer to move store.

46. Following his discussion with the claimant, Stephen Clancy carried out investigations into the claimant's grievance issues. He interviewed Paul Purdie and Paul Meehan on 10 September 2021. The notes at B324 – B334 are an accurate reflection of his discussion with Paul Purdie. The notes at B335 – B344 are an accurate reflection of his discussion with Paul Meehan. He contacted John Norfolk and obtained information from him by email (B346).

He interviewed Sally McDaid on 23 September 2021 (following her return from leave). The notes at B348 – B358 are an accurate reflection of his discussion with Sally McDaid. Stephen Clancy's decision on the claimant's grievance issues was set out in letter to her dated 28 September 2021 (B361 – 365). Stephen Clancy did not uphold any of the claimant's grievance issues, for the reasons set out in his letter. In relation to point 1, although Stephen Clancy found that Paul Purdie had sent the 'incorrect risk assessment' to the claimant, Stephen Clancy's conclusion was "*I have found no evidence of any intent to treat you any differently to anyone else within your peer group, and no evidence of any bullying towards you, therefore based on my findings I do not uphold this point.*" The decision letter concluded as follows:-

"*In summary, based on the information available to me, I do not uphold your grievance as I feel the store have followed both company policy and government guidance accordingly throughout the pandemic and your absence.*

Whilst I acknowledge you were sent the wrong risk assessment template, which was a mistake, I feel you have been treated fairly and consistently in comparison to your peers and within all said policies and procedures.

I am confident that as a business we have adhered to Government guidance, and I do not feel the store have breached any of our internal Health and Safety processes relating to covid or put any colleagues at risk. And I am also confident that individual risk assessments have been undertaken appropriately in line with the government guidance at the time when colleagues have returned to work.

As you were signed as unfit to work by your GP, I am satisfied that the store recorded and managed your absence correctly in line with our policies.

I have identified a number of learnings during my investigation which I will be sharing with the East Kilbride management which includes:

> *Ensuring correct documentation is provided to colleagues*
>
> *Improve absence reporting procedures within store to ensure accuracy and consistency.*

Next steps / agreed actions

It has always been the intention of the management team in the East Kilbride store to support you in returning to work as you are a valued member of the team. I would hope that you are willing to now engage in conversation with either Sally McDaid the Depute Manager or myself to discuss returning to work.

I hope this resoles your concerns. If you are not satisfied with my decision you have the opportunity to appeal by completing the grievance form below and sending it, within 5 calendar days of receipt of this letter to the appeal manager detailed below."

47. The claimant did not appeal that decision. The claimant resigned by letter dated 11 October (B367 – 368) in the following terms:-

"*Sadly the events of the past year and culminating in the field of my recent grievance to uphold any of the points raised has left me with no option but to submit my resignation with immediate effect.*

The events I refer to include the issue of the wrong risk assessment by my line manager twice (30/7/20 & 15/3/21), failure to interpret health information medical information provided by my GP and verified by Health Management Ltd, advice by line manager risk assessments were not being updated to permit safe return to work when regular updates were taking place, delay in offer of reasonable adjustments, failure by yourself to follow B& Q guidance and the miscommunication of my medical circumstances within B & Q.

The recent grievance failed to recognise the documented processes of RAS042 and 43 were not followed to interpret medical circumstances. It attempted to offer an excuse as to why these processes were not followed. Grievance findings ignored the implications of me being given the wrong information stating I could not return to work and the further advice risk assessment was not being updated. The findings leave me with no confidence in the wider B&Q governance process to deal with the issues I have raised.

The actions I have experienced and failure of recent grievance to uphold any of my points is a clear demonstration to me mutual trust has been breached to

the point my working relationship with B&Q is no longer tenable. I consider myself to be constructively dismissed.

Please dispose of any items in my work locker.

Please send any payslips (including those I have been requesting since November 2020) and P45 to my home address shown above please release any further payment due to me for holidays etc."

48. Paul Meehan had retired from B & Q by the time of the claimant's resignation letter. His successor, Tony O'Brien wrote to the claimant on 13 October 2021, in reply to her letter (B370). He stated "*I note from your resignation letter that you have expressed concerns about how your situation has been handled. I'd like to have the opportunity to talk through your concerns and a way forward under my new leadership to help facilitate a return to work for you."*

49. The course of the COVID 19 pandemic has been challenging for the respondent. It has had a responsibility to operate safely, having been classed as an essential retailer and given authority to open during periods when other businesses required to be closed. It has been a busy time for managers, who had responsibilities to ensure that appropriate safety measures were put in place and adhered to, to enable the stores to operate safely for staff for customers, as the government guidance changed. Checks were carried out by Trading Standards to ensure that the EK store was acting within the relevant government guidelines.

Comments on Evidence

50. The crux of this case was that the claimant did not provide to the respondent a 'shielding letter' issued from the NHS or a letter from her GP setting out that she was in the group of people who should be 'shielding' at certain times during the COVID 19 pandemic. Although we accepted the undisputed evidence of the claimant that she is prescribed autoimmune medication and that the effects of that medication are that the claimant is more susceptible to infections circulating in the community, there was no evidence before the Tribunal of the extent of the those effects. That was significant with regard to the reference in

in the respondent's template risk assessment to '*People on immunosuppressant therapies sufficient to significantly increase risk of infection'.* Although it was not disputed that the medication which the claimant is prescribed for her arthritis condition has an immunosuppressant effect, there was no medical report providing evidence on the extent of that immunosuppressant effect. It was not disputed by the respondent that one of the effects of that medication are that the claimant is more susceptible to infections circulating in the community. There was not sufficient evidence before the Tribunal for us to make findings on the extent of that immunosuppressant effect. That however was not a question for this Tribunal. We had to determine whether the claimant had the protected characteristic of disability, in respect of the effects of the claimant's conditions of arthritis and psoriasis.

51. The claimant's evidence on why she did not produce such a letter from her GP was '*I didn't have to'*. The situation could have been resolved had the claimant obtained such a letter from her GP. The claimant's position was that she '*could not tell the GP how to provide their support'* but she admitted that she had obtained a letter from her GP in the past. There was no explanation as to why the GP did not provide such a letter, other than it not having been asked for by. There was no suggestion that such a letter would not be provided, had it been asked for. Under cross examination, the claimant's evidence was "*I provided GP information and they said that's not what we're looking for. That's discrimination."* It was put to the claimant under cross examination that in requiring the claimant to provide a letter from her GP (or a shielding letter) she was being treated equally to other employees. The claimant's reply was "*I saw it as the complete opposite. I felt I was having to go a lot further than everyone else. Others in the store whose partners were high risk were allowed to come back. I never got that. I was not allowed to shield and come back to work as the public health information changed".* There was no evidence that the respondent's policy was not applied equally. We accepted the evidence of the respondent's witnesses. We accepted the respondent's position that the claimant would have been treated as shielding had she supplied a shielding letter or letter from her GP. If the claimant had been treated as CEV / shielding

she would have been expected to return to work, with suitable adjustments in pace, at the stages in the pandemic when those other employees who were classed as CEV / shielding returned.

52. It was significant that under cross examination, when it was put to the claimant that she had wanted to resolve the grievance by a '*pay off*' she denied that, saying '*No, I was wanting to resolve the issues and come back to the store. No one discussed the issues I had*". It was directly put to her that she was wanting a pay off and her evidence was 'I *was hoping we could resolve matters and I could return to work'.* That evidence was inconsistent with the claimant's grievance letter, which was contemporaneous documentary evidence. When the claimant was taken to that letter (B311) she said ' *I know where you are going with this. I said can we not just go our separate ways and I get a settlement.'* Her position then changed from being that she had wanted to resolve matters to '*I had spent a lot of time trying to resolve. Up to this point I was trying to get back to work. I had spent a lot of time trying to resolve the issues. I didn't think I needed to resolve them. It should have been the employer.'* The claimant was not found to be credible in this changed position.

53. It was significant that the claimant chose not to appeal the grievance decision. When asked about this, her evidence was "*I presumed they would all be the same. They're all managers in the one region. I thought it was likely to be found that they would uphold none of my points."* There was no evidence to support that position.

54. On her own evidence, the claimant's position was based on assumptions. Several times during the claimant's evidence, she stated '*I assumed'* or '*I presumed'*. Her position in examination in chief was that because Paul Purdie had not phoned her on 31 July 2020 and because of what she had read in the risk assessment template re the level of risk if CEV employees returned to work, she '*assumed they had realised I shouldn't be in the store and that's why I wasn't contacted'.* That 'assumption' was inconsistent with the claimant's knowledge that other employees were returning to work, inconsistent with the evidence that there had been discussions with her about what had been put in place in the store to keep employees and customers safe and inconsistent with

the claimant having then approached her GP and being further certified as unfit for work. Her evidence was then that *'I didn't contact them…. I assumed as soon as they worked out how to bring me back safely I would be rota 'ed in and return to work."* This was despite the claimant's evidence that she was aware that shielding had ended at that time. The claimant's evidence was "*Shielding was ending. My doctor had asked how they were going to bring me back to work safely. He was a bit concerned as the virus was still circulating in the community".* The claimant misunderstood the purpose of the Occupational Health report. Her evidence was that this was '*to find out if I was high risk / CEV'.* The claimant's interpretation of the template risk assessments focused on certain wording without reading it as a whole, and within the context that it was meant: as a guide to managers.

55. The claimant was inconsistent in her recollections of events. Her recollection varied from being very specific on certain points, to being unable to remember or only have a vague memory of events which supported the respondent's position. Additionally, her position on what had occurred was inconsistent. She said '*No one entered into dialogue with me. They wouldn't speak to me*." That was inconsistent with the claimant's own evidence on discussions with respondent's witnesses, with the documentary evidence and with the respondent's witnesses' evidence. That inconsistency was significant. The claimant had a tendency to skew interpretation of events. Her evidence was that Paul Purdie had told her that she should phone in weekly and no longer hand in sick lines and that in doing so he was '*setting her up for a fall'*, so that she would be dismissed for not having her absence certified. There was no evidence that Paul Purdie was '*setting her up for a fall'* , or that the respondent was taking steps to dismiss the claimant. The evidence did not support the claimant's interpretation of events. The claimant accepted that even after she stopped handing in fit notes she continued to be treated as if she was on sickness absence. The claimant's evidence was *I should probably still have been on furlough*'. Under cross examination the claimant accepted that there had been '*no comeback'* for not handing in sick lines. When that was put to her as being a fair assessment, her evidence was "*That's fair but it was not a reflection of the circumstances as he (*Paul Purdie) *told me not to hand in sick*

lines. That was obviously key.” When asked *‘to what’,* the claimant’s reply being *“That he was not following processes.”* The claimant’s evidence was that after the phone call on 30 July 2020 Paul Purdie had ‘*eventually’* sent her risk assessment RAS043. The emails from Paul Purdie showed that that had 5 been sent by email to her on the same day, after only one email being sent earlier that day without the attachment. We accepted Paul Purdie’s evidence that this was only one matter he was dealing with at that very busy time and that in error he had forgotten to insert the attachment and then had made a mistake by clicking on the wrong attachment in the list of risk assessment 10 templates on the respondent’s intranet, RAS0043 being the top one on the list of many risk assessments for various categories. The claimant relied on the examples of reasonable adjustments in the version of RAS0042 sent to her by Sally McDaid (B258 – 267) as being a list which the respondent had a duty to offer, despite this being stated to be ‘*examples’*. She did not read that risk 15 assessment in its whole context, or with regard to the stated government guidance re Scotland (at B261). Her evidence was “*We did discuss about reasonable adjustments but they failed to give me the full suite of reasonable adjustments. I can’t remember what ones we discussed’.* That position was considered to be significant. For all of these reasons, the claimant was not 20 found to be a reliable witness. Where there was a conflict of evidence between her position and that of the respondent’s witnesses, the evidence of the respondent’s witnesses was more credible. We did not accept the claimant’s evidence that Sally McDaid was ‘*not interested in resolving the problems’* or that the respondent was *‘trying to manage me out of the business and block* 25 *my grievance.* There was no evidence to support that position.

56. The claimant could not explain why she was certified as unfit for work for the period from 3 August 2020 until 16 August 2020, because of ‘*H/O rheumatoid arthritis’* (fit note at B240) and also the period from 1 August 2020 until 31 August 2020, because of ‘*Psoriatic arthritis’* (fit note at B241). Nothing was 30 stated in the ‘comments’ sections of either of those fit notes.

57. The claimant was inconsistent as to the reason for her resignation and her position in evidence was not supported by the contemporaneous documentary

evidence. Under cross examination, when it was put to her that she resigned because Paul Purdie and Sally McDaid were not being moved store, her position was "*That was only part of it. All the questions in the grievance remained unanswered. Nothing was discussed. It was only when I resigned that I got copies of the paper payslips.*" The evidence did not support the claimant's position. There had been substantial discussion with the claimant.

58. All of the respondent's witnesses were credible and reliable witnesses. They were open in their answers to questions. They did not seek to avoid questions and gave full answers. All made appropriate concessions where they admitted mistakes e.g. re wrong risk assessment being sent to the claimant, activity logs not being entirely accurate, misunderstanding of the claimant's position. All of their evidence was consistent with the documentary evidence which was drawn to the Tribunal's attention. They were consistent throughout their evidence and their evidence was consistent with the documentary evidence. There was no evidence of collusion e.g. Paul Purdie could not say whose handwriting was in B217, but Sally McDaid was able to explain. For these reasons, where the evidence of the claimant conflicted with that of the respondent's witnesses, the evidence of the respondent's witnesses was preferred.

59. It appeared from the cross examination questions put to the respondent's witnesses that the claimant's case was based on a number of positions (i) that because of the terms in the 'comments' section of the claimant's sick line for the period from 2 July to 31 July (B219), that ought to have been taken by the respondent as evidence that the claimant should be treated as 'Clinically Extremely Vulnerable' (ii) that because the claimant's name had been written on a risk assessment template, that constituted a risk assessment having been completed in respect of her return to work (ii) that there was a duty on the respondent to offer the claimant every adjustment listed as an example on the risk assessment template (iii) that the respondent was insisting on a shielding letter being provided from the NHS. All of these were misunderstandings of the position.

60. The claimant had recovered documents from the respondent following a Subject Access Request. In interpreting the documents received, it appeared

that recognition was not given to the intention of those documents being for internal communication. This included the risk assessment RAS042 (beginning at B220) and the ‘Return to Work’ note (B217 - 218). The claimant did not have sight of those documents until around July 2021, and so they could not have influenced her state of mind or behaviour before that time. The claimant did not appear to appreciate that these documents were not intended to be communicated to her and so were not set out in the way of communication to an employee. The claimant then sought to rely on what had been recovered in that Subject Access Request as part of the series of events by which the respondent had acted in breach of the implied term of trust and confidence. An example of this was the note at B217, which the claimant relied upon as being inaccurate because a return to work interview had not taken place. It had been identified by Stephen Clancy when hearing the claimant’s grievance, that the standard of record keeping at the EK store was not what it should have been. However, that standard did not contribute to a fundamental breach of the implied term of trust and confidence. The claimant’s representative was critical of the respondent’s standards e.g. in recording communications with the claimant, but there was no recognition on the part of the claimant that the situation could have been resolved by her obtaining the necessary shielding letter from her GP.

61. We recognised that at the time of these dealings with the claimant the respondent was operating in new and difficult circumstances as a result of the COVID 19 pandemic. The respondent’s witnesses were dealing with unprecedented circumstances. All of the respondent’s witnesses were compelling in their evidence on various changes / adjustments having been made in the EK store as a response to the COVID 19 pandemic. Significantly, their evidence was that in addition to the various general measures put in place to keep employees and customers safe, a number of adjustments were put in place for employees classed as 'Clinically Extremely Vulnerable’(‘CEV’). We accepted the respondent’s witnesses’ consistent evidence position that during the COVOD 19 pandemic they had dealt with a number of employees who had provided either a NHS Shielding letter or a letter from their GP and so were dealt with by the respondent as being ‘CEV’. The claimant did not dispute the

respondent's witnesses evidence that there were a number of other employees who they had dealt with who were so categorised as CEV and who had a number of adjustments put in place for them to meet their individual requirements and enable them to return to work. The claimant did not dispute the respondent's witnesses' evidence that at certain stages of the COVID 19 pandemic all those CEV employees returned to work, while the claimant was signed off by her doctor. That evidence was significant both with regard to showing the respondent's general response to making adjustments and showing the reason why the claimant was treated in the way she was. The claimant was not treated as CEV because the claimant had not submitted to the respondent either a shielding letter or a letter from her GP.

62. The claimant did not dispute the respondent's witnesses' evidence that at certain times during the pandemic, all other employees they were dealing with who were treated as being 'Clinically Extremely Vulnerable' had returned to work, with suitable adjustments having been made by the respondent to enable that return. There was no dispute to the respondent's witnesses' evidence that adjustments were put in place by the respondent to enable those others to return to work. We considered that to be significant evidence.

63. Paul Purdie was clear in his evidence that what was required from the claimant was either an NHS provided 'shielding letter' or a letter from the claimant's GP stating that the claimant was in the shielding / high risk / clinically extremely vulnerable category. The claimant's representative's continued questioning on the basis that the respondent's position was that only an NHS provided shielding letter would be taken as the necessary evidence showed an essential misunderstanding of the respondent's position.

64. We accepted that there was no disadvantage to the claimant arising from the risk assessment relevant to the Republic of Ireland having been sent to her. We accepted the evidence of all of the respondent's witnesses that risk assessment templates are intended to be an internal document, to use as a guide for managers' discussions with the employee on their return to work. In this case, the wrong template had been sent to the claimant. The intention was

that that would assist the discussions on what should be done to enable the claimant to return to work.

65. Paul Purdie was genuine, credible, consistent and plausible in his evidence. For these reasons we accepted the evidence of Paul Purdie was that he had made a genuine mistake when sending the claimant risk assessment template RAS042 rather than RAS043. He apologised to the claimant for that, on a number of occasions. His evidence was '*It was me personally who made the mistake and I have expressed my apologies'* . We accepted his explanation for that mistake: that he had clicked on the top document in the list of risk assessments on the respondent's intranet site and that it was during a very busy time at work because of dealing with the additional measures being put in place in reaction to the covid 19 pandemic. The evidence of all of the respondent's witnesses was that the risk assessments covering various situations are found in the respondent's intranet and are in a list and that it was a busy time. We accepted Paul Meehan's evidence that the respondent is '*a large company and there is a risk assessment for everything. There was a risk assessment for Covid. It's just prompts to hopefully cover a range of issues which may come up. It was to assess the risk of Covid*.' We accepted Paul Purdie's evidence that he had not realised that he had sent the '*wrong risk assessment'* to the claimant until this was put to him as part of the investigations in to the claimant's grievance. Again Paul Purdie apologised for this. His position was consistent throughout. We accepted Paul Purdie's evidence that there was '*no malice'* and they were '*pretty similar documents'*. We did not accept as genuine the claimant's position under cross examination that 'I *haven't been able to work or shield because of this mistake'.*

66. We accepted that Paul Purdie only realised under cross examination that he had also sent the wrong risk assessment template in March 2021. We accepted that he had not pursued the claimant's absence because he was worried about the effect of the pandemic on her mental health and '*left her job open for her*'. We accepted that Paul Purdie '*didn't pursue that there were no sick lines*' for the claimant and was not '*managing her absence'*, rather he was '*leaving her position open for her for when she was ready to return to work.'*

We accepted and considered significant his evidence that '*I thought I was doing the right thing to leave her. I was trying to get her back to work. I was making the point that others who were CEV and furloughed were back to work. I wasn't in a position to force her to come back."* And that he '*wanted her back in store*." We accepted his evidence that he had not told the claimant that she no longer needed to hand in sick lines. We accepted that he had on occasion handed delivered documents to the claimant and that there was no process of recording when documents were sent. On balance, we accepted that B224 records that Paul Purdie had asked the claimant to provide an NHS shielding letter or letter from her GP. We accepted Paul Purdie's evidence that he is not medically qualified and therefore would not make a decision himself about whether someone was in the CEV category, and that all other employees who he line managed who were treated as CEV had provided either a letter from the NHS or their GP. We accepted that he would sometimes call the claimant from his mobile phone. We accepted his evidence that he was not aware that sick lines were not being handed in by the claimant until October 2020. We accepted his evidence that '*HR is the admin role. It's a busy environment'.*

67. The claimant's evidence was that she was told by Paul Purdie that the risk assessment she had been sent would not be getting updated. Paul Purdie's evidence was that his position to the claimant with regard to the risk assessment was that that would be carried out in a discussion with her on her return to work. That evidence was consistent with the evidence of Paul Meehan, Sally McBride and Steven Clancy on the respondent's practices with regard to carrying out risk assessments and considering what adjustments should be put in place. There was no evidence to support the claimant's evidence that she had been told that the risk assessment would not be updated. The claimant did not dispute that in her conversation with John Norfolk he explained the purpose of the risk assessment template and the regular updates which were done to the Covid 19 risk assessments, further to the changing government advice. For these reasons, and because the claimant was found to not be an entirely reliable witness, we did not accept that the claimant has been told that her risk assessment was the one sent to her and would not be updated. We did then not accept the claimant's evidence

that Paul Purdie's position was that the risk assessment would not be updated. The claimant accepted under cross examination that she knew that the completion of the risk assessment was a process which required her input.

68. It was significant that the claimant did not challenge the evidence of Paul Purdie that all employees who were treated by the respondent as CEV had provided either a shielding letter from the NHS or a letter from a GP. The claimant also did not challenge Paul Purdie's evidence that she had been directed to ask her GP for a letter.

69. There was a direct dispute in evidence between the claimant and Paul Purdie in respect of whether the claimant had been told that she no longer needed to hand in sick lines. We accepted Paul Purdie's evidence, based on him having no recollection of having said that, that that not being something which he would have advised and employee and because that was not consistent with the position in Paul Purdie's letter to the claimant of 30 September 2020. It was the claimant's evidence that it was in the a phone call with Paul Purdie on 30 September 2020 that he told her that she did not need to hand in sick lines any more. Generally, Paul Purdie was found to be a more credible witness than the claimant.

70. Mr Beaton relied on the Occupational Health report as being contradictory. That position was based on the position that it was contradictory for the claimant to be stated as being in the high risk/ clinically extremely vulnerable category, to recommend safe working measures at work and also to recommend strict adherence to the COVID risk assessments at work. There would be contradiction if strict adherence to the risk assessment would mean that a person in the category of high risk / clinically extremely vulnerable should not be at work at all. The claimant admitted that she was aware from the News that it was a changing situation. When asked about the steps she took to protect herself during the pandemic, her evidence was 'I shielded at home. That lasted 12 weeks anyway, probably longer, till the end of the summer.' That showed an awareness of the changing circumstances in respect of the risks from COVID 19. Despite that general awareness, she remained fixed in her assumption that it had been assessed that a CEV person should not return

to work. The claimant took that position despite her admitted knowledge of the changing position with regard to guidance on risk from the Coronavirus pandemic. The claimant's own evidence was that her GP's position was that she should ask her employer what they were doing to allow her to return to work safely: not that she should not return to work at all because of the level of risk. The claimant had had conversations with Paul Purdie, Paul Meechan and Sally McDaid about the various covid safety measures which had been put in place and the further steps which could be put in place for the claimant. The claimant had spoken to John Norfolk, where the purpose of the risk assessment was explained. There were discussions about various adjustments the respondent either had put in place generally re covid safe measures, or which could be put in place specifically for the claimant. The claimant's fixed position, in all these circumstances, was the context within which it required to be considered if the respondent had acted in breach of contract. The claimant's evidence on the 'wrong' risk assessment template being sent to her was "*That's been a detriment to me, I haven't been able to work or shield because of this mistake.*" We did not accept that position.

71. Paul Meehan was compelling in his evidence. We accepted his position that '*the business was asking us to be supportive of everyone. Maybe members of staff who were not CEV but a person in their household was and they were nervous about coming into work. We were asked to be supportive of everyone and make sure everyone felt safe at work. There were a lot of people concerned. We would do our best to make sure everyone was comfortable with the environment*.' We accepted his evidence that when he spoke to the claimant in July 2020 it was '*Part to introduce myself, part to understand where she was with the situation and part to give her confidence that we were open to pretty much anything to support her return: a different department, roles, hours. I was trying to give her confidence that we were open to a number of different solutions to her returning to work.'* We accepted his evidence that the claimant was '*a lovely lady on the phone. Everyone had a kind word to say about Karen. She was very convivial. I came off the phone thinking that all she was saying was that she still felt vulnerable and couldn't return but I felt we were making some headway.'* We accepted his evidence in his discussion with

the claimant about her return to work '*all things were on the table*'. We accepted his position that the claimant '*was always lovely on the phone then 24 / 48 hours later an email would come into the business and the tone and content was not in the spirit of the conversation. She seemed hung up on different wee things and I felt distorted the situation.'* *We* accepted as compelling Paul Meehan's evidence that because of the pandemic circumstances he had *'a lot more freedom to budget'* and that he had *'a certain degree of flexibility'* to create a position for the claimant that she would be comfortable doing and that this was reflected in his discussions with her. We accepted that he had carried out a number of 1:1 interviews with employees who were classed as CEV and had returned to work as the pandemic circumstances changed. We accepted his position being '*I'm a shop keeper. I'm not categorising anyone.*' And that re categorising the claimant as CEV it was '*not my position to make a call on'*. We accepted that his position was he was trying '*to continue to work with Karen to see if we could get her back to work' and that they 'had a place for her in the workplace'*. We accepted that in deciding that Sally McDaid should deal with the claimant he took into account that he '*knew Sally spoke very highly of Karen*.' We accepted his evidence that in dealing with the claimant's absence '*there was a time delay. We're always concerned when someone is off but it's a big organisation and it was extra difficult because of the pandemic."* Paul Meehan was compelling in his evidence on the discussions he had with the claimant. He admitted that he couldn't remember the exact dates but was able to give a clear recollection of two phone calls he had with the claimant. When directed to the contemporaneous written record of one of those calls (B293), that note was consistent with his evidence that his position to the claimant had been that '*all options were on the table'* with regard to her return to work. That was significant,

72. Sally McDaid was entirely consistent, credible and reliable, withstanding robust cross examination from the claimant's husband and her evidence was considered to be significant. We considered Sally McDaid to be genuine in her position that she had considered the claimant to be a friend, had tried to offer

support to her to assist her to come back to work and had been hurt that the claimant had suggested that her behaviour towards her was inappropriate.

73. Stephen Clancy admitted that he had not realised that the wrong risk assessment template had been sent to the claimant on two occasions. We accepted that that did not alter his decision.

74. The claimant's evidence was that she had spoken to her GP after receiving a copy of the Occupational Health report and that her GP's position was that '*back to back working*' was not suitable because of the asymptomatic spread of Coronavirus in the community. There was no medical evidence supporting that position. It remained surprising that despite the claimant having fairly regular contact with her GP, no letter was provided from the GP to B & Q. We did not accept the claimant's position in her evidence that the GP had provided support by way of a sick line and that it was not for her to '*tell her GP how to provide support'*. We did not accept this, particularly in circumstances where the claimant admitted that on other occasions her GP had provided a letter for her on request. In any event, at various stages in the pandemic, there were times when even employees who were high risk / CEV had returned to work for the respondent. Therefore, even if the claimant had provided a shielding letter or letter from her GP, and had been treated by the respondent as being CEV rather than being on sickness absence, she would have been expected to return to work during the period when the claimant remained absent. No comparator was provided by the claimant. The claimant did not dispute the evidence of the respondent in respect of the measures they took to enable other employees who were aged over 70 and / or who were in the high risk/ clinically extremely vulnerable group to return to work.

75. It was clear that the situation reached an impasse. The claimant's evidence was "*Paul Purdie was telling me it was safe to come into work. He said you are just visiting, you're not coming into work. I said I'm trying to get you to tell me how I can safely return to work."*

76. The respondent is not without criticism in this case. In her email of 9 November 2020 (B270 – 271) the claimant clearly set out her understanding of the position

at that time. Much of that position was based on misunderstanding and presumption, e.g. that on the basis of risk assessment RAS043 the claimant could not come back to work. The respondent had an opportunity to consider the claimant's understanding and to revert to her in respect of the various points she made. Those points included a request for further information in respect of the claimant's (mis)understanding that she did not require to certify her absence (with sick lines). We accepted Paul Purdie's evidence that he had '*discussed the content of that email in several calls with the claimant.*' And that '*in hindsight, it's a learning experience, I felt I had covered the content of the email in November in the subsequent calls'*. It would have been better to have followed up the calls with written confirmation. In April 2021, Paul Meehan set out pertinent questions in his email to HR (B280 – 281). There was no evidence before us that replies were given to those questions. Had there been, the necessary investigation could have led to a clearer understanding of why there was an impasse. We did not have sight of the letter from the solicitor instructed by the claimant which was sent to Paul Meehan in April 2020, or the reply to that. We were informed that the respondent's Counsel's instructing solicitors had taken the view that that letter should be considered to be privileged.

77. We accepted the claimant's position that, on the face of it, the Occupational Health report appears to give an opinion on the claimant as having been '*clinically assessed as having a health condition that puts them in the Government, Public Health and NHS COVID 19 high risk, extremely vulnerable category."*. We accepted the claimant's evidence that she would not have described herself to the Occupational Health examiner as 'clinically assessed', in that we accepted that that was not a phrase which the claimant would have used. It was however noted that that statement was written under the heading in the report of 'Relevant History' and that, to those familiar with reading such reports, that section normally sets out what the individual has told the assessor. We therefore accepted the respondent's witnesses' evidence that their understanding was that that was what the claimant had told the assessor.

78. We accepted Sally McDaid's evidence that the tone of the email she received from the claimant in May 2021 (B285 – 286) was not in line with the tone of the prior phone conversation which she had had with the claimant. That email does not seek to progress the options which were discussed. That suggests that the claimant did not want to progress these options and return to work. It was not in dispute that as at the claimant's discussion with Sally McDaid in May 2021 the claimant had been offered adjustments in an attempt to return to work. The claimant's criticism of the respondent from that time became that she had not been offered '*the full suite of adjustments'* by that she was referring to the list of examples of possible adjustments set out in RAS0043. There was no obligation on the claimant to offer the claimant every adjustment set out in that list of examples. We did not accept the claimant's evidence that '*other things were withheld'.* Sally McDaid discussed with the claimant the adjustments which were reasonable for the respondent to put in place taking into account the claimant's skills and experience and the available roles. We did not accept the claimant's position in evidence that although it had been discussed that John Norfolk would carry out the risk assessment with the claimant, Sally McDaid then '*took that option away*.'

79. We did not accept the claimant's position in evidence that the respondent was '*deliberately withholding the grievance'.* There was no evidence to support the claimant's position that after the conference phone call with Sally McDaid and John Norfolk the respondent was '*not interested in resolving the problem' or that they were 'trying to manage [the claimant] out of the business and block [her] grievanc*e.' We considered Sally McDaid's response to the claimant's email of July 2021 to be conciliatory in its tome and to be another attempt to seek to resolve matters and enable the claimant to return to work (B308). We accepted that the suggestion that the claimant move store was part of that discussion and in that spirit. It was significant that the grievance form was accepted by the claimant as having been sent to her with that email.

Codes of Practice

80. In determining the claims under the Equality Act 2010, the Tribunal had regard to the Equality and Human Rights Commissions Code of Practice on Employment ('the EHRC') (2011).

5 81. In particular, the Tribunal took into account Chapter 5 re the section 15 claim; Chapter 6 re the section 20 claim and Chapter 7 re the section 26 claim.

82. In determining the constructive dismissal, we took into account the ACAS Code of Practice, as set out below.

Submissions

10 83. Both representatives helpfully exchanged and provided written submissions. Mr Beaton also produced a revised version of his 'Schedule of Less favourable Treatment'. They were given the opportunity to speak to those submissions.

84. The decision section below sets out where the submissions were accepted or not. It is note that the 'Schedule of Less Favourable Treatment' makes 15 references to alleged breached of sections 44 and 100 of the Employment Rights Act 1996. No claim was brought under those sections and the agreed issues for determination by this Tribunal did not include consideration of that legislation.

Burden of Proof

20 85. The Tribunal approached its considerations of the claimant's claims under the Equality Act in terms of the Burden of Proof provisions as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and* ors. –v- Wong and others 2005 ICR 931, CA (as approved by the Supreme Court in *Hewage –v-* 25 *Grampian Health Board* [2012] IRLR 870).

86. The Tribunal required to consider the strength of all the evidence, presented to it by both parties, and decide whether the claimant has made out her case, on the balance of probabilities. The standard of proof applied in Employment Tribunal cases is the civil standard of proof of 'on the balance of probabilities'.

87. The burden of proof was on the claimant to prove that she had the protected characteristic of disability at the relevant time

88. The claimant made claims under sections 13, 15, 20/ 21, 26 and 27 of the Equality Act 2010. The Tribunal made its findings in fact and considered the claims made by the claimant in respect of each provision of the Equality Act relied upon by her. In respect of each provision relied upon, the claimant did not prove facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the relevant provision. The burden of proof did not move to the respondent in respect of any of these claims.

Decision

89. The Tribunal made its decision in respect of each of the agreed issues.

Disability Status

90. There was no medical report supporting the claimant's position that she had the protected characteristic of disability, within the meaning of the Equality Act 2010 section 6. The claimant's medical records showed that she was diagnosed with arthritis (variously referred to as rheumatoid arthritis / psoriatic arthritis) and psoriasis and that she was prescribed medication. The Tribunal accepted the claimant's uncontested evidence that she was prescribed immunosuppressant medication for her arthritis. The Tribunal accepted the uncontested evidence of the claimant that in a period when she was not prescribed immunosuppressant medication, the claimant's condition of rheumatoid arthritis had significant effects on her day to day activities, to the extent that she could not enter / exit a walk in shower without assistance and could not bend to put on shoes. The claimant's evidence on the significant extent of the effects of her arthritis on her day to day activities, in the period when she was not treated by medication for that condition, was not disputed. That was significant.

91. We had to determine whether the claimant had the protected characteristic of disability, in respect of the effects of the claimant's conditions of arthritis and

psoriasis. We decided that question with regard to the effects of those conditions untreated. It is on the basis of that evidence that we found that the claimant has the protected characteristic of disability. For these reasons, the Tribunal accepted that at the relevant time the claimant had the protected characteristic of disability, in accordance with section 6 of the Equality Act 2010, Schedule 1, para 5(1) and the Guidance on the Definition of Disability, in particular section B re the effects of treatment.

92. It was not disputed that the claimant's colleagues would not have noticed that the claimant had any particular limitations as a result of her arthritis. The Tribunal accepted that that was because the claimant's condition was well managed by the prescribed medication she had been taking throughout her employment with the respondent and because she could sit when doing her job with the respondent.

93. There was no evidence to lead to a finding that the claimant met the definition of disability as a result of the effects of her psoriasis condition.

Knowledge of Disability

94. Although the respondent contested that the claimant had disability status, it was their position that if the claimant was found to have that protected characteristic, then it would be accepted that the respondent would have had knowledge of that from the time of their receipt of the Occupational Health report (October 2020). The Tribunal accepted that position.

Equality Act s13

95. Direct discrimination under section 13 of the Equality Act 2010 is where:

"A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

96. There was no evidence to suggest that the claimant was treated less favourably by the respondent because of her disability. The claimant was not treated less favourably. There were no submissions on the comparator

treatment, other than the comparator being hypothetical. The question that required to be asked is 'what was the reason for the claimant's treatment by the respondent?' The answer to that question is 'because the claimant did not provide the required medical information i.e. a shielding letter or letter from GP. We accepted the respondent's witnesses' evidence that the claimant's circumstances were different to those of the respondent's employees who were treated as 'Clinically Extremely Vulnerable' because the claimant had been certified by her GP as unfit for work (B219) and she had not provided a shielding letter or letter from her GP. There was no explanation why the sick line had been provided rather than a letter. We accepted the respondent's witnesses evidence that other employees of the respondent had not received a shielding letter from NHS but had provided a letter from their doctor which led to them being treated as 'Clinically Extremely Vulnerable'. On that basis, we found that the reason the claimant was not treated by the respondent as being Clinically Extremely Vulnerable was not because of her disability, but because she had not provided a shielding letter or letter from her doctor in support of that position. It was not disputed that the claimant's circumstances were exceptional because she had been signed off as being unfit to work, rather than a letter being issued that she should be treated as shielding / Clinically Extremely Vulnerable.

97. Given the background of the undisputed evidence on the steps taken by the respondent to allow employees certified as CEV to stay off work and to return to work safely at various stages throughout the pandemic, and given our acceptance of the respondent's reasons for their treatment of the claimant, no inference of unlawful discrimination because of the claimant's disability could properly be drawn.

98. We accepted Mr Hughes' submission that the matters relied upon by Mr Beaton in his Schedule of Less Favourable Treatment are not unlawful direct discrimination under section 13. None of the matters relied on by Mr Beaton were treatment because of the claimant's disability. The claimant's claim under section 13 of the Equality Act 2010 is unsuccessful and is dismissed.

Equality Act s15

99. The claimant relies on section 15 of the Equality Act 2010 (discrimination arising from disability). The provisions of section 15 are as follows:-

"(1) A person (A) discriminates against another (B) if –

5 *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Subsection (1) does not apply if A shows that A did not know and could not
10 *reasonably have been expected to know, that B had the disability."*

100. Following *City of York Council v Grosett [2018] ICR 1492, CA,* section 15 requires an investigation of two distinct causative issues:

- Did A treat B unfavourably because of an identified 'something'; and

15
- Did that something arise in consequence of B's disability.

101. The first issue involves an examination of the putative discriminator's state of mind – did the unfavourable treatment occur because of A's attitude to the relevant ' something'. That may be a conscious or unconscious state of mind. The second issue is an objective matter, whether there is a causal link
20 between B's disability and the relevant 'something'. There is no further requirement that A must be shown to have been aware, when choosing to subject B to the unfavorable treatment in question, that the relevant 'something' arose in consequence of B's disability. The test of justification under section 15(1)(b) is an objective assessment by the ET. The 'something'
25 must 'more than trivially' influence the treatment but it need not be the sole or principle cause (e.g. in *Pnaiser v NHS England [2016] IRLR 170, EAT*). The Tribunal should determine, was the claimant's disability the cause, or a significant (more than trivial) influence on or for that unfavourable treatment? If so, the question is, has the respondent established that it had a legitimate

aim? Then, if so, has the respondent established that the treatment of the claimant by the respondent was a proportionate means of achieving that legitimate aim?

102. The EHRC Code of Practice provides guidance on what is unfavourable treatment. At para 5.7 it states:-

"For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

103. The reason for the claimant's treatment was because she did not provide the respondent with a shielding letter or a letter from her GP. The comments in the sick line is not a letter from the GP. That 'something' does have a causal link to the claimant's disability. Importantly however, on the findings in fact, the claimant was not treated unfavourably. She was allowed to remain absent from work. She received payments as if CEV until the time when she became certified as unfit for work. From the time when the claimant was certified as unfit for work, it was legitimate for the respondent to make payments to her in line with their Absence Policy. In his 'Schedule of Less Favourable Treatment', the claimant's representative relies on the effects of fatigue and reduced immunity / increased risk of infections as arising from the claimant's disability. The claimant was not treated unfavourably because of these effects. We accept the submissions of Mr Hughes. The claimant's claim under section 15 of the Equality Act 2010 is unsuccessful and is dismissed.

Equality Act s20/ 21

104. The claimant relies on section 20 of the Equality Act 2010 (duty to make adjustments). The applicable provisions of section 20 are as follows:-

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

5 *(2) The duty comprises the following three requirements.*

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid
10 *the disadvantage…."*

105. No requirement was identified by the claimant. There was no requirement placed on the claimant to return to her substantive role with the respondent. The claimant did not identify any PCP. The consideration should be on whether the identified PCP(s) put her at a substantial (i.e. more than minor or
15 trivial) disadvantage in comparison with persons who are not disabled? If so, what steps does the claimant say it would have been reasonable for the respondent to have taken to avoid that disadvantage? Did the respondent know, or could they reasonably have been expected to have known, (i) that the claimant had a disability and (ii) that the claimant was likely to be placed
20 at a substantial disadvantage? Did the respondent fail to take such steps as it was reasonable for them to take to avoid that disadvantage?

106. We accepted the entirely credible evidence of Paul Purdie Paul Meehan and Sally McDaid that in their discussions with the claimant they had sought to reassure her about changes which had been made in the store as a result of
25 the Covid 19 pandemic, and that they tried to discuss various adjustments with the claimant, with a view to putting them in place and the claimant returning to work. That included discussion on various alternative roles, including, latterly, creating a role for the claimant.

107. The claimant's claim under sections 20 / 21 re alleged failure to make
30 reasonable adjustments was based on the timing of discussions and on respondent not having offered the claimant '*the full suite'* of example

adjustments listed in the template risk assessment. In her evidence the claimant did not deny that she had been offered various adjustments, including different roles. Her recollection was unclear as to what had been offered to her. When asked what alternative roles had been discussed with her , the claimant's evidence was "*pricing, tills and I think potentially out of hours. That wouldn't have worked with my condition because of the fatigue. I don't know if the options would have worked or not."* The reason that these adjustments were not put in place was because the claimant's position was that she could not enter the store because of the risk from Covid 19. There was no suggestion that what was suggested or proposed by the respondent would not have been put in place had the claimant agreed to return to work. The respondent's witnesses' evidence was that '*we unfortunately didn't get to that stage because the claimant would not come into the store*" The claimant's evidence was "*I don't know if any of them would have been suitable as there was supposed to have been a management review. That would have assisted in deciding what reasonable adjustments would have been suitable. No management review was carried out."* There was an impasse or stalemate situation because the claimant would not come into the store for the necessary discussion and to see the adjustments which had been and could be put in place in the store.

108. In all these circumstances, the respondent did not fail in their duty to make reasonable adjustments. They did not require the claimant to return to her substantive role and offered various alternatives to that role to her. There is no obligation to offer all of the example adjustments in the template risk assessment. Not all were relevant to the claimant's skills and experience.

109. We accept Mr Hughes' submission that the evidence of each of the respondent's witnesses showed a clear willingness to put in place any adjustment which the claimant would have seen as allowing her to return to work. We do not accept Mr Beaton's reliance on there having been 'no management review'. The evidence shows that the respondent sought to put adjustments in place and that the barrier to them being put into effect was the

claimant's refusal to come in to the store. The claimant's claim under sections 20 / 21 of the Equality Act 2010 is unsuccessful and is dismissed.

Equality Act s26

110. The claimant relies on section 26 of the Equality Act 2010 (harassment). The relevant provisions of section 26 are as follows:-

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

a. Violating B's dignity, or

b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

(2)…

(3)…

(2) In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) The perception of B;

(b) The other circumstances of the case;

(c) Whether it is reasonable for the conduct to have that effect.

111. Disability is listed as one of the relevant protected characteristics in section 26(5). When asked in examinations in chief what acts were bullying and harassment, the claimant's evidence was "*It was bullying and harassment asking me for a shielding letter only and asking me to phone the absence manager every week and that was discrimination based on medical circumstances*". We took this evidence into account and applied the terms of section 26 to the material findings in fact and consideration of what is relied

upon in Mr Beaton's 'Schedule of Unfavourable Treatment'. It is noted that the respondent had not insisted that only a shielding letter being provided before the claimant would be treated by them as CEV. A letter from the claimant's doctor would have sufficed.

112. The claimant's email to Paul Purdie of 30 September 2020 (B243 – 244) was important because it was contemporaneous evidence which supported the claimant's position on her understanding of events at the time they occurred and because the claimant's introduction in that email indicates that the claimant was happy to speak to Paul Purdie at that time. There is no suggestion from that email that by that time (30 September 2020) there had been any conduct which may constitute harassment within the meaning of section 26 of the Equality Act 2010.

113. The notes of the absence review meeting on 9 October 2020 (B250 – 252) were significant. These notes supported Paul Purdie's position that it was intended to take steps to make the environment safe for the claimant to return to work. The claimant agreed that those notes were an accurate reflection of what was discussed. There is no indication in those notes that until that time there had been any behaviour towards the claimant which may be considered to be harassment within the meaning of section 26.

114. On the basis of the findings in fact, there was no evidence to show that the matters relied upon in Mr Beaton's 'Schedule of Less Favourable Treatment' had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In her grievance the claimant did not allege that that had been the case. We accept Mr Hughes' submissions. The claim under section 26 is unsuccessful and is dismissed.

<u>Equality Act s27</u>

115. The claimant relies on section 27 of the Equality Act 2010 (victimisation). The relevant provisions of section 27 are as follows:-

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

5 *(2) Each of the following is a protected act –*

(a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;

(c) Doing any other thing for the purposes of or in connection with this
10 *Act;*

(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

116. It was accepted that by raising her grievance the claimant had done a protected act within the meaning of section 27. There was no evidence that
15 the claimant had been subjected to a detriment because of having done that protected act. There were no primary facts from which an inference of victimisation could be drawn. We accepted Mr Hughes' submissions. The only act to post- date the protected act was the grievance outcome. That outcome was not a detriment under section 27. On the basis of the findings
20 in fact, there was no evidence to show that the matters relied upon in Mr Beaton's 'Schedule of Less Favourable Treatment' occurred because the claimant had done had a protected act, even on the basis of the protected act being a request for reasonable adjustments. The claim under section 26 is unsuccessful and is dismissed.

25 Compensation

117. Having concluded that none of the claimants claims under the Equality Act 2010 are successful, the claimant is not entitled to any award in respect of any breach of the Equality Act 2010.

Constructive Dismissal

118. The claimant relied on the respondent having breached the implied term of trust and confidence, with the outcome of the grievance raised by the claimant being the 'last straw' relied upon by the claimant. Section 95(1)(c) of the Employment Rights Acts 1996 ('the ERA') sets out that where the employee terminates the contract under which they are employed, in circumstances in which they are entitled to terminate without notice by reason of the employer's conduct, then that employee shall be taken as dismissed by their employer. This is known as constructive dismissal. Case law has developed in respect of constructive dismissal. That case law is relevant to the Tribunal's determination of a claim under section 95(1)(c). Following *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*, there must be a breach of contract by the employer. It may be either an actual breach or an anticipatory breach. That breach must be sufficiently important or serious to justify the employee resigning, or else it must be the last in a series of incidents which justify them leaving. The employee must leave in response to the breach and not for some other, unconnected reason. Following *Leeds Dental Team Ltd v Rose [2014] IRLR 8,* the test of whether there has been a breach of the implied term of trust and confidence is objective. Following *Mahmud v BCCI SA [1997] ICR 606,* and *Bournemouth University Higher Education Corp v Buckland [2009] ICR 1042 (EAT),* in a claim in which the employee asserts a breach of the implied term of trust and confidence, he must show that the employer had, without reasonable and proper cause, conducted himself in a manner calculated, or likely, to destroy or seriously damage the relationship of trust and confidence between them. Following *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,* in a case involving the 'last straw', the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. In such a case, the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? Although the final straw may be relatively insignificant, it must not be utterly trivial. To be successful in a

constructive dismissal claim, the employee must establish that (i) there was a fundamental breach of contract on the part of the employer (ii) the employer's breach caused the employee to resign; and (iii) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

119. We accepted Mr Hughes' submission that none of the issues relied upon by the claimant constitute a breach of the implied term of trust and confidence and agree with him that nor or do they all, together with the refusal of the grievance a breach entitling the claimant to resign. We accept his submission that the apparent difficulties in communication would have been substantively resolved had the claimant obtained the necessary medical information in the same way that other affected employees had done. We accepted Mr Hughes's submissions that Paul Purdie, Paul Meehan and Sally McDaid sought to have the claimant return to work in an environment where she would feel comfortable. We accept his reliance on the respondent's Risk Manager providing reassurance to the claimant and explaining the purpose of the risk assessment. We accept that the evidence does not show that the Paul Purdie or Sally McDaid were seeking to put the claimant at risk and agree that it suggests the reverse. We accept his submissions that the claimant's position that she has so lost trust in her employer that she will never work again does not bear scrutiny. We accept his submission that by indicating her desired outcome of the grievance hearing was to receive settlement compensation, the claimant demonstrated that she was not meaningfully engaging in discussions with an outcome of her returning to work.

120. We did not accept that there was a delay in the respondent dealing with the Grievance Procedure. There is no obligation on an employer to follow up a request for a grievance form. There may be situations where an employee requests a grievance form and then, on reflection, decides not to proceed with raising a grievance. Having found Paul Purdie to be an entirely credible and reliable witness, the Tribunal accepted his position that he had hand delivered a Grievance form to the claimant but had not kept to record of doing so. The Tribunal recognised the criticism made by Stephen Clancy in the Grievance

outcome in respect of the standard of records kept by the respondent in the East Kilbride store. That included a failure to record that the Grievance form had been delivered to the claimant. The Tribunal recognised that in her emails to the respondent she did ask for the grievance form and that each element of the emails were not always answered in writing for the respondent. The Tribunal accepted Paul Purdie's evidence that he did discuss the content of the emails with the claimant and that his focus was on helping her to return to work.

121. In his submissions, Mr Beaton relied on Mr Clancy's evidence on his decision on the claimant's grievance e.g. his admission that he was not aware that the wrong risk assessment form had been sent twice to the claimant. In considering the basis of the constructive dismissal claim it was important to consider the terms of the grievance letter sent to the claimant. Additional comments given by Mr Clancy in his evidence could not have been part of the reason for resignation, as they were not known by the claimant at the time of her resignation.

122. In considering the reasonableness of the grievance decision, we considered how that grievance had been dealt with regard to the ACAS Code. It is clear from the Code that Grievance Procedures should be approached with a view to resolving the issues. That is different from a Disciplinary Procedure. The ACAS Code defines grievances as '*concerns problems or complaints that employees agrees with their employers'*. (4.21) The guidance at 4.21 states "anybody working in an organisation with working conditions or relationships with colleagues that they wish to talk about with management they want the grievance to be addressed and if possible resolved it is also clearly in the management's interests to resolve problems before they can develop into major difficulties for all concerned." The Tribunal was satisfied that in dealing with the claimant's grievance Stephen Clancy was seeking to resolve the situation and get the claimant back to work. The guidance in the ACAS Code on the conduct of grievance meetings (also at 4.25) is:-

"Managers should:

- *remember that a grievance hearing is not the same as a disciplinary hearing and is an occasion when discussion and dialogue may lead to an amicable solution.*
- *Make introductions as necessary.*
- *Invite the employee to restate the grievance and how they would like to see it resolved.*
- *Put care and thought into resolving grievances they are not normally issues calling for snap decisions and the employee may have been holding the grievance for a long time. Make allowances for any reasonable 'letting off steam' if the employee is under stress.*
- *Consider adjourning the meeting if it is necessary to investigate any new facts which arise.*
- *Sum up the main points.*
- *Tell the employee when they might reasonably expect a response if one cannot be made at the time, bearing in mind the time limits set out in the organisation's procedure."*

123. In dealing with the claimant's grievance, Stephen Clancy followed the principles set out in the Code. He sought to resolve matters. In certain matters (e.g. incomplete absence logs) Mr Clancy's investigations led him to make criticisms of the respondent. He properly considered whether the claimant had suffered a disadvantage as a result.

124. In respect of appeal, the ACAS Code at 4.28 states "*where an employee feels that their grievance has not been satisfactorily resolved they should appeal."* This again shows that the emphasis in handling a grievance should be to seek resolution. Stephen Clancy appropriately dealt with the claimant's grievance by focusing on seeking a resolution of the problem. We did not accept Mr Beaton's submissions that the findings are contradictory and at odds with the information provided. We did not accept Mr Beaton's submission that that

the grievance was not a fair and reasonable review of the issues raised and supporting information provided.

125. We did not accept that the terms of the grievance outcome letter constituted the last straw in the context of the claimant's decision to resign (with reference to *Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA).* Importantly, the claimant was aware that there was an appeal process and took no steps to appeal the decision. In any event, the respondent did not act in fundamental breach of contract by the series of events set out in the Findings in Fact. The respondent was seeking to resolve the situation and enable the claimant to come back to work. It was unreasonable for the claimant to adopt the position that she did not approach her doctor for a letter because she 'didn't need to'.

126. We did not accept that the claimant experienced difficulties in bringing the grievance. Importantly, any delay in the progress of the grievance is considered from the time when the grievance form was submitted by the claimant. There was no suggestion from the claimant that there was unreasonable delay aster the grievance form was submitted. We did not accept Mr Beaton's submission that the circumstances in *Secretary of State for Justice v Plaistow* UKEAT/0016/20/VP were in line with the circumstances in this case. That case is authority in respect of circumstances leading to a career long loss of earnings.

127. The implied term of trust and confidence is a term implied into the contract of employment between the respondent and the claimant. An essential term of that employment contract is that the claimant carries out her duties in return for pay. In the circumstances of this case, the claimant was not carrying out her contractual duties to work for the respondent. The respondent did not seek to rely on that and allowed the claimant to remain absent from work, despite the claimant having failed to (i) provide the information requested by the respondent i.e. an NHS 'shielding letter' or a letter from her GP and (ii) comply with their reasonable request for her come in to the store to review the steps in place to reduce the risk from Covid 19 and discuss what further steps may be appropriate to put in place in respect of the claimant's own

circumstances. On the basis of the Findings in Fact, the respondent allowed the employment contract to continue while the claimant remained absent. The claimant refused the respondent's reasonable requests to come into the store to discuss the claimant's return to work and adjustments which may be made. The respondent's actions did not constitute a breach of contract.

128. For these reasons the Tribunal concluded that the respondent did not act in fundamental breach of the term of trust and confidence. The claimant's claim of unfair (constructive) dismissal is unsuccessful and is dismissed. The claimant is therefore not entitled to an unfair dismissal award or compensatory award.

129. If the claimant had been entitled to a compensatory award, a considerable deduction would have been made in respect of the claimant's failure to mitigate her loss. The claimant had not sought any alternative employment. Her position was that she had lost trust in all employers and that '*if B & Q as the country's largest DIY retailer couldn't get it right'* there was no medical or other evidence to support that being the claimant's position.

Wages

130. The agreed list of issues for determination by the Tribunal did not include any issue re wages. In his submissions, Mr Beaton relied on sections 8 and 13 of the ERA 1996. We accepted the respondent's representative's evidence in respect of the respondent having moved to digital itemised pay slips, and there having been two years notice given of that change. Section 8 does not require the itemised pay details to be in paper form. There was no breach of section 8. There was no claim registered with the Tribunal under section 8 ERA. Had there been, on the facts that claim would have been unsuccessful and dismissed.

131. The claimant had no right to be paid in full for periods when she was not attending work, other than in terms of the Absence Policy. We accepted Paul Purdie's evidence that the payments the claimant received were in accordance with her being on furlough, then payments in accordance with the respondent's absence policy. We accepted Mr Hughes' reliance on the

evidence of Paul Purdie in respect of the payments made to the claimant There was no unlawful deductions from wages under section 13 of the ERA. The claim under section 13 ERA is unsuccessful and is dismissed.

5 Employment Judge: Claire McManus
Date of Judgment: 02 June 2022
Entered in register: 08 June 2022
and copied to parties

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